BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VERNON L. CRIDER	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,068
EATON CORPORATION	)	
Respondent,	)	
Self-Insured	)	

ORDER

Claimant appealed the November 22, 2000 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on May 2, 2001.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an October 28, 1998 accident and resulting injury to the low back. In the November 22, 2000 Award, Judge Moore denied claimant's request for a work disability (a disability greater than the functional impairment rating) because claimant was fired for stealing tools – tools that claimant alleges he purchased from a former coworker. The Judge awarded claimant a 10 percent permanent partial general disability. Additionally, the Judge denied claimant's request for medical mileage reimbursement as the Judge was not convinced that the mileage claim did not include mileage for claimant's commute to work.

Claimant contends Judge Moore erred. Claimant argues that his termination should not preclude a work disability as (1) respondent allowed its employees to commingle their tools with company tools; (2) claimant's allegation that he purchased the tools that were

allegedly stolen was supported by substantial competent evidence; (3) respondent's belief that the tools were stolen was not supported by evidence; and (4) respondent's policy regarding removing items from the plant was not adequately communicated to all employees. Claimant requests the Board to modify the Award and grant him a work disability and a $1,179.84 award for medical mileage.

Conversely, respondent contends the Award should be affirmed. Respondent argues the Judge properly determined that claimant should be denied a work disability because he was terminated for cause. Respondent also argues that claimant returned to work without restrictions and without accommodations following the accident and, therefore, claimant is not entitled to a work disability pursuant to the ruling in *Watkins*.[1] Finally, respondent argues the Judge properly denied the medical mileage claim as claimant failed to prove that the claimed mileage related only to medical travel.

The issues before the Board on this appeal are:

1. Does claimant's termination preclude an award for work disability?

2. If not, what is claimant's permanent partial general disability?

3. Is claimant entitled to an award for medical mileage reimbursement?

FINDINGS OF FACT

After reviewing the record, the Board finds:

1. Claimant injured his low back on October 28, 1998, when he slipped and fell while at work. The parties stipulated the accident arose out of and in the course of employment with respondent. The parties agree claimant sustained a 10 percent whole body functional impairment as a result of the accident and the resulting low back injury. The parties also stipulated that claimant's average weekly wage on the date of accident was $1,108.33.

2. Among other doctors, claimant obtained medical treatment from Dr. Frederick R. Smith, who is board-certified in physical medicine and rehabilitation. Dr. Smith treated claimant from February 26, 1999, through September 28, 1999, prescribing such treatment as physical therapy, a TENS unit, pelvic traction, piriformis injections, sacroiliac joint injections, and medications.

3. It is common practice for respondent's employees to bring their personal tools to respondent's plant. The personal tools are then commingled with the tools provided by

[1] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

respondent. Generally, company tools are not marked in any manner to distinguish them from other tools.

4. On approximately July 20, 1999, claimant forgave a $470 debt owed to him by a former coworker, Dustin Ratzlaff, in exchange for Mr. Ratzlaff's tool cabinet and miscellaneous tools. Mr. Ratzlaff had worked for respondent as a lead man and had taken many personal tools to work that he or his grandfather had purchased from pawnshops, auctions, and trade catalogs. Mr. Ratzlaff's testimony is credible that the tools he sold claimant belonged to him. Mr. Ratzlaff's testimony was persuasive as he could remember where he acquired many of the items that he took to work.

5. On July 22, 1999, claimant removed from respondent's premises two boxes of tools that he had purchased from Mr. Ratzlaff. Although some of the items were similar to tools furnished by respondent, Mr. Ratzlaff assured claimant that they belonged to him. After attempting to page his supervisor, Swede Lindbloom, during the evening dinner break, claimant took the boxes of tools to his van. Upon learning that claimant had removed the boxes from the plant, Mr. Lindbloom requested to inspect the boxes. Claimant did not object and fully cooperated with Mr. Lindbloom, advising that he had purchased the tools from Mr. Ratzlaff. The next day, July 23, 1999, respondent terminated claimant for breach of trust. Respondent conducted very little, if any, investigation to determine whether the tools in question belonged to respondent or whether claimant had purchased the tools, as alleged. Although the record is not entirely clear, it does not appear that respondent contacted Mr. Ratzlaff.

6. Mr. Ratzlaff was deposed during the litigation of this claim and he was asked to examine the tools that respondent had confiscated from claimant. Mr. Ratzlaff identified the tools as being those claimant purchased from him, except for two or three that he did not recall being in his tool cabinet.

7. By removing the boxes of tools without a pass, claimant violated a company policy of which he was unaware. In 1993, respondent adopted a package pass procedure that required employees to obtain permission from a supervisor before removing items from the plant. But that procedure was not contained in respondent's collective bargaining agreement. Further, there is no record the document outlining the package pass procedure was ever disseminated to respondent's employees.

Conversely, claimant testified that he was unaware that respondent had such a policy as he had not seen anyone obtain a pass during the last two or three years of his employment. Claimant was aware that the plant's former owner, Cessna Aircraft, had a package pass procedure but he thought the procedure had been discontinued along with the security officers that Cessna had stationed at the exits.

8. At the time of his termination, claimant was working without restrictions although he was still receiving medical treatment. Claimant had requested no restrictions from his doctor and Dr. Smith complied, believing claimant was being accommodated on the job.

According to Dr. Smith, when he released claimant from treatment in late September 1999, he did not give claimant permanent work restrictions for two reasons. First, claimant had been working without restrictions. And second, the doctor was aware that claimant needed a job and he believed claimant's job search would be easier without work restrictions. Nevertheless, Dr. Smith testified claimant should not perform any tasks that would require him to lift more than 50 pounds.

9. Following the accident, claimant continued to work for respondent in his regular job but he required help lifting. Claimant did not formally receive any permanent work restrictions until October 1999 when he saw Dr. C. Reiff Brown, who is board-certified in orthopedic surgery. According to Dr. Brown, claimant should restrict his lifting and bending, as follows:

> I believe that he [claimant] should avoid lifting above 50 pounds occasionally, 30 pounds frequently. He will have to do all lifting using proper body mechanics. He should also avoid frequent bending and rotation greater than 30 degrees.[2]

10. The Board is mindful that claimant's supervisor, Mr. Lindbloom, testified that the employees under him regularly accommodated each other. Mr. Lindbloom also testified that claimant required no extraordinary accommodation following the October 1998 work-related accident.

Despite Mr. Lindbloom's testimony, the Board finds and concludes that after the October 1998 accident claimant required additional accommodation over and above any accommodation that was provided before the accident. Therefore, the Board finds that claimant returned to accommodated work following his accident.

11. The Board finds that claimant has lost the ability to perform approximately 33 percent of his former work tasks. That finding is based upon the testimonies of both Dr. Smith and Dr. Brown. Dr. Smith reviewed the task list prepared by labor market expert Jerry D. Hardin, M.S., and indicated that claimant should not do at least four tasks that he performed for respondent, along with the tasks from former jobs that exceeded a 50-pound lifting restriction. Using that criteria, Dr. Smith's restrictions prohibit claimant from performing nine of the 27 work tasks (33 percent) that claimant performed in the 15 years immediately preceding the October 1998 accident. Dr. Brown also indicated that claimant should no longer perform nine of his 27 former work tasks as shown on Mr. Hardin's list.

---

[2] Deposition of Dr. C. Reiff Brown, June 13, 2000; p. 14.

12. After being terminated by respondent, claimant diligently sought employment and began working at Arrow Machine on August 11, 1999, earning $420 per week. On September 21, 1999, claimant was laid off. Claimant next began working for Nickles Industrial Manufacturing on October 19, 1999, earning $420 per week until January 1, 2000, when his wages increased to $567.42 per week. On June 26, 2000, claimant was terminated without warning from that job for allegedly failing to comprehend and perform all aspects of his job.

When he last testified on October 9, 2000, claimant was receiving unemployment benefits and looking for work. The record contains a 14-page list of potential employers that claimant had contacted from June 26, 2000, through October 6, 2000, as part of his job search.

The Board finds that claimant has made a good faith effort to find appropriate employment. The Board also finds that claimant has the following percentages of wage loss for the following periods:

> From October 28, 1998, through July 23, 1999 – zero percent (as claimant continued to work for respondent at a comparable wage).
>
> From July 24, 1999, through August 10, 1999 – 100 percent (as claimant was unemployed).
>
> From August 11, 1999, through September 21, 1999 – 62 percent (comparing the $1,108.33 pre-injury wage to the $420 post-injury wage at Arrow Machine).
>
> From September 22, 1999, through October 18, 1999 – 100 percent (as claimant was unemployed).
>
> From October 19, 1999, through December 31, 1999 – 62 percent (comparing the $1,108.33 pre-injury wage to the $420 post-injury wage at Nickles Industrial Manufacturing).
>
> From January 1, 2000, through June 26, 2000 – 49 percent (comparing the $1,108.33 pre-injury wage to the $567.42 post-injury wage at Nickles Industrial Manufacturing).
>
> Commencing June 27, 2000 – 100 percent (as claimant was unemployed).

13. At the regular hearing, which was held in June 2000, claimant introduced an exhibit that listed the mileage that he testified he drove to attend his doctors' appointments and to pick up his prescribed medications. Claimant requests mileage reimbursement for only three trips to the drug store on February 27, March 27, and July 3, 1999, at 66 miles per

trip. Claimant indicated that he was not claiming mileage expense reimbursement for those times that he picked up his medications on days that he worked.

Claimant also requests mileage expense reimbursement for the trips that he made to Dr. Smith, Hutchinson Hospital, and Midwest Pain Clinic. Claimant initially testified that on each of those trips he drove from home to the appointment and then back home. But claimant later testified that it was possible that he had driven to work before returning home. Claimant testified, in part:

> Q. (Mr. Heath) So you could have gone from home to the doctor, then the doctor to work and then home again?
>
> A. (Claimant) Possible, sir.
>
> Q. Do you believe that you have submitted round trip medical mileage from your home to the doctor on days when you would have had work intervening in the middle of those trips?
>
> A. I'm not sure what you're asking, sir.
>
> Q. Well, really, I'm not sure what you're asking, Mr. Crider. It looks like you're asking to be paid for driving from Lyons to Hutchinson and going to the doctor when you were driving from Lyons to Hutchinson to go to work anyway?
>
> A. Yes, sir.
>
> Q. Is that what you've done?
>
> A. I'm not sure, sir. When I went and got shots, I can't remember if I went back home or I went to work.[3]

CONCLUSIONS OF LAW

1. The Award should be modified to grant claimant a work disability and to award him reimbursement for certain medical mileage expenses.

2. Because claimant's injury constitutes an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

---

[3] Regular Hearing, June 22, 2000; p. 47.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon an ability to earn rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

3. Because claimant continued to work for respondent following the October 1998 accident, claimant continued to earn a wage that was comparable to the wage that he was earning on the date of accident. Therefore, from October 28, 1998, through the date of claimant's termination on July 23, 1999, claimant's permanent partial general disability is limited to his 10 percent whole body functional impairment rating.

4. The parties hotly contest the extent of claimant's permanent partial general disability for the period commencing with his termination from respondent's employment.

---

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Copeland*, p. 320.

Respondent first argues that claimant returned to work following the accident without restrictions and, therefore, the *Watkins* case precludes an award for work disability.

The Board concludes that the *Watkins* case does not apply. *Watkins* is distinguishable. Here, claimant required accommodations when he returned to work for respondent following his accident. Watkins returned to his job without accommodations.

But more importantly, *Watkins* involved an entirely different definition of permanent partial general disability.[7] The former version of K.S.A. 44-510e, upon which *Watkins* was premised, involved a two-pronged ability test that measured the worker's post-injury ability to perform work in the open labor market and the worker's post-injury ability to earn a comparable wage.

Conversely, the ability to earn wages only becomes a factor under the present version of K.S.A. 44-510e when a finding is made that a worker has failed to make a good faith effort to find appropriate employment.[8] When the worker has made a good faith effort to find appropriate employment, the statutory language controls and the difference in the actual pre- and post-injury wages is used in the permanent partial general disability formula.[9]

5. Respondent also argues that claimant was terminated for cause, which then precludes an award for work disability. It is true that respondent believed that claimant had stolen company tools. But it is equally true that claimant believed, in good faith, that those same tools had been personally owned by Dustin Ratzlaff. Although respondent's investigation appears somewhat lacking, it cannot be said that either party has acted in bad faith. Further, when an employer permits employees to bring their own tools to the job and they are then commingled with the employer's unmarked tools, it is not surprising that conflicts over ownership would occur. Also, when company policies and procedures, such as the package pass procedure involved here, are not disclosed to the employees, it is likewise not surprising that workers are not cognizant of company rules and regulations.

The standard is unclear when a post-injury termination precludes a work disability.[10] Nonetheless, the Board concludes that a balancing test should be applied in these

---

[7] *Helmstetter v. Midwest Grain Products, Inc.*, ___ Kan. App. 2d ___, 18 P.3d 987 (2001).

[8] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 804, 995 P.2d 369 (1999), *rev. denied* 269 Kan. ___ (2000).

[9] *Copeland*, *supra*, at 804.

[10] See *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

situations.[11] The Board further concludes that claimant's actions in purchasing and removing the tools from respondent's premises did not rise to a level that would establish a lack of good faith. Therefore, because claimant has made a good faith effort to obtain appropriate employment following his termination, the actual difference in claimant's pre- and post-injury wages should be used in the permanent partial general disability formula.

6. Averaging claimant's 33 percent task loss with his wage losses, claimant has the following percentages of permanent partial general disability for the following periods:

> From July 24, 1999, through August 10, 1999 – 67 percent (33 percent task loss averaged with a 100 percent wage loss).
>
> From August 11, 1999, through September 21, 1999 – 48 percent (33 percent task loss averaged with a 62 percent wage loss).
>
> From September 22, 1999, through October 18, 1999 – 67 percent (33 percent task loss averaged with a 100 percent wage loss).
>
> From October 19, 1999, through December 31, 1999 – 48 percent (33 percent task loss averaged with a 62 percent wage loss).
>
> From January 1, 2000, through June 26, 2000 – 41 percent (33 percent task loss averaged with a 49 percent wage loss).
>
> Commencing June 27, 2000 – 67 percent (33 percent task loss averaged with a 100 percent wage loss).

7. The Board concludes that claimant has established his right to receive medical mileage reimbursement for three trips to the pharmacy totaling 198 miles. Therefore, claimant is entitled to mileage reimbursement in the sum of $62.70 (132 miles x 32 cents per mile, or $42.24, for the February 27 and March 27, 1999 trips, and 66 miles x 31 cents per mile, or $20.46, for the July 3, 1999 trip).

The Board finds and concludes that claimant has failed to prove that he is entitled to receive reimbursement for any of the other miles claimed as he was unable to establish that those trips were for medical treatment instead of part of his regular commute to work.

8. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

---

[11] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

AWARD

WHEREFORE, the Board modifies the November 22, 2000 Award, as follows:

Vernon L. Crider is granted compensation from Eaton Corporation for an October 28, 1998 accident and resulting disability. Based upon an average weekly wage of $1,108.33, Mr. Crider is entitled to receive the following disability benefits:

For the period from October 28, 1998, through July 23, 1999, 38.29 weeks of benefits are due at $366 per week, or $14,014.14, for a 10 percent permanent partial general disability.

For the period from July 24, 1999, through August 10, 1999, 2.57 weeks of benefits are due at $366 per week, or $940.62, for a 67 percent permanent partial general disability.

For the period from August 11, 1999, through September 21, 1999, 6 weeks of benefits are due at $366 per week, or $2,196, for a 48 percent permanent partial general disability.

For the period from September 22, 1999, through October 18, 1999, 3.86 weeks of benefits are due at $366 per week, or $1,412.76, for a 67 percent permanent partial general disability.

For the period from October 19, 1999, through December 31, 1999, 10.57 weeks of benefits are due at $366 per week, or $3,868.62, for a 48 percent permanent partial general disability.

For the period from January 1, 2000, through June 26, 2000, 25.43 weeks of benefits are due at $366 per week, or $9,307.38, for a 41 percent permanent partial general disability.

For the period commencing June 27, 2000, 186.50 weeks of benefits are due at $366 per week, or $68,260.48, for a 67 percent permanent partial general disability and a total permanent partial disability award not to exceed $100,000.00.

As of July 20, 2001, claimant is entitled to receive 142.29 weeks of permanent partial general disability compensation at $366 per week in the sum of $52,078.14, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $47,921.86 shall be paid at $366 per week until paid or until further order of the Director.

The Board awards claimant medical mileage reimbursement in the sum of $62.70.

The Board adopts those orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I believe that claimant has met his burden of proving his entitlement to reimbursement for the mileage driven to Dr. Smith, Hutchinson Hospital, and Midwest Pain Clinic. Therefore, I would further modify the above award to include reimbursement for that mileage expense.

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Edward D. Heath, Jr., Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director